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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 49

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION, AND
HAZELTINE CORPORATION, A CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF RESPONDENT HAZELTINE RESEARCH IN RESPONSE TO ZENITH REPLY BRIEF

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Zenith's reply brief makes so many incorrect statements as to the record, and new contentions, that it would not be possible to deal with them in oral argument and leave time to consider the real facts and issues. We are therefore filing this reply brief.[1]

1. In this brief, we use the same abbreviations as set forth at footnote 2, page 2, of Hazeltine Research's answering brief. In addition, we refer to Zenith's Reply Brief as "Z.Rep.Br." and to Hazeltine Research's answering brief as "H.R.Br." Where emphasis appears in quotations in this brief, it has been supplied by us unless otherwise indicated.

1. At page 1 of its reply brief, Zenith makes the statement that "respondents cannot by record reference controvert *one single fact* set out in petitioner's statement of the case or point to *one error* in any record reference contained in the original brief."

In our original brief we have pointed out a great number of errors in the statements made in Zenith's brief and failures of the record references cited by Zenith to support the statements made by it. For example, at pages 94-95, and 128-129, we called attention to glaring misstatements of the record. Without attempting to be exhaustive, we point out that other instances of incorrect statements in Zenith's opening brief, or of misleading representations of the record, or of the citation of record references which do not in fact support the statements made, were noted in Hazeltine Research's answering brief at pages 30, 31, 51-52, 65-66, 90-91, 91-93, 95-96, 103-04, 105, 109, 125-26, 135, 138, 139, 143-44, 155-57, 162, 165 (n. 76) and 167.

Further, we point out in this memorandum additional instances of new misstatements appearing in Zenith's reply brief.

2. In an attempt to create the impression that the Canadian pool kept Zenith from obtaining distributors after the RCA settlement, Zenith's Reply Brief (p. 27) states, "The testimony was undenied that because of the activity of the pool Zenith could not obtain any distributors except in Western Canada (A. 456)." Not only does the cited record reference fail to support the statement, but Zenith's own published records show it is not so. Zenith's Annual Reports stated that in 1958 Zenith appointed "[f]our outstanding and experienced independent distributors . . . in western Canada," and that by the end of 1959 "Zenith *now has a strong distribution network* at

both the wholesale and retail level *throughout Canada*" (1958 and 1959 Zenith Annual Reports, A. 2991, 2993). We suggest that the truth should not be suppressed just because the trial judge incorrectly refused to admit the Annual Reports in evidence (H.R. Br. 117-18).[2]

Zenith attempts to explain away its Annual Reports by reference to the trial court's statement that "there is no obligation to cry on the stockholders' shoulders" (Z.Rep.Br. 29). The answer is two-fold: First, Zenith *ignores* entirely the fact that instead of "crying," these reports are full of *affirmative* and glowing statements and representations by Zenith as to the outstanding growth and success which followed its entry into the Canadian market after the 1957 settlement, including references to the "enthusiasm of distributors and dealers," "successfully countered the downward industry sales trend," "gratifying progress" and the like (H.R.Br. 113-115). Second, Zenith *did* freely and at length "cry on its stockholders' shoulders"—when there was something to cry about. Thus each year it reported to its shareholders about its various problems in foreign markets, including such things as "severe foreign competition," "lower priced products"; and specially as to Canada it reported on "heavy starting costs," problems of "exchange ratio," "imposition of additional tariffs," and the like (H.R.Br. 116). But *never once* after 1957 did Zenith make any mention of the Canadian pool or of any problems with the Canadian pool.

3. Zenith takes issue with the foreword in the Hazeltine Research brief concerning the lack of substance to Zenith's claims (Z.Rep.Br. 1-2). Yet Zenith's reply brief provides further proof of the lack of credibility of Zenith's claims.

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2. Zenith agrees that its Annual Reports are "public records" (Z.Rep.Br. 29).

(a) Zenith admits that its original contention and findings that the pools prevented it from building up a market in England and Australia were untrue. Zenith's original damage claims as to England and Australia (as well as Canada) as set forth in the findings were based on the contention that for many years prior to the alleged damage period *the pools* had kept Zenith from importing into those three countries and from establishing a market:

> "Q. Now, isn't it a fact, Mr. Kaplan, that Zenith has taken the position from the beginning of this litigation that for many years it was excluded by patent pools from importing radio and television sets into all three countries, Canada, England and Australia?
>
> "The Court: Well, it has not only taken that position, Counsel, but they persuaded the Court to so find.
>
> • • •
>
> "A. I think that that is correct" (A. 3446-47; see also A. 3204 and H.R. Br. 8-10).

In later hearings, over the vigorous opposition of Zenith,[3] Hazeltine Research proved that it was *not the pools*, but the governmental embargoes "and nothing else" which had kept Zenith from exporting to England and Australia and building up its markets in those countries (H.R.Br. 16-17). And on recall in November 1965, faced with the truth, Zenith's witnesses asserted that they had at all times been aware of the embargoes and their effect (H.R.Br. 19-22).

In its reply brief Zenith now not only *admits* that "It is established on this record that it was not possible to export Zenith sets into England during the periods starting with the war and ending in June 1959 because of import restrictions" (Z.Rep.Br. 20), but *seeks to rely on the embargoes*

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3. See footnote 14, H.R.Br. 22.

imposed in England and in Australia to explain its conduct in failing to file a counterclaim with its Answer in 1960 (see p. 10, *infra*). In other words, Zenith and its witnesses admitted, on recall, and in its reply brief Zenith *now admits again,* that its original claims as to England and Australia, involving the contention that *the pools* had kept Zenith out of those countries for many years prior to 1959, *were not true.*

(b) Zenith continues to rely on testimony which the witnesses themselves repudiated. Zenith's witnesses had testified at the trial in February 1964 that: (1) Zenith had imported television sets into England which had been modified by Zenith to the English 405-line standard; (2) Zenith's English distributor had converted Zenith sets to the 405-line English system; and (3) its distributor had made limited sales of such modified sets (H.R.Br. 33/36). Accordingly, Zenith proposed and the trial court entered Finding XXII, reciting that "Zenith has successfully engineered sets for the British market and has shipped some to its English distributor . . ." (A. 2902).

But on deposition of Zenith's English distributor it was disclosed that no 405-line sets had been sent by Zenith to the English distributor, none had been converted to the 405-line system by the distributor, and no such sets had been offered for sale by the English distributor, and thereafter, upon recall of the Zenith witnesses in November 1965, they recanted their original testimony and admitted it had no basis (H.R.Br. 36-40).

Zenith's own records disclose the reason Zenith made no effort to enter the English television market after the lifting of the embargo on June 8, 1959, namely, that Zenith was waiting for a change in the broadcast standards to the 625-line system (H.R.Br. 40-44), and the Court of Appeals

properly so concluded (A. 4257). Nevertheless, Zenith ignores its own contemporaneous records and asserts that its failure to attempt to sell television sets in the English market was because of the "obvious and inherent threat" of the English pool (Z.Rep.Br. 20). What does Zenith cite as support? It refers to A. 464 and pages 86-88 of its original brief (Z.Rep.Br. 20, 21). The material cited consists primarily of the *very testimony of Messrs. Wright and Kaplan* given in February 1964 which *they repudiated* at the later hearing in November 1965 (H.R.Br. 33-40).

It was pursuant to its original contentions and testimony, afterwards repudiated as outlined above, that Zenith sought "damages" as to "England-Television" (A. 2908) in the amount of $8,079,859 or $24,239,577 after trebling—all without basis in fact.

4. Zenith's reply brief comes up with a new approach on the question of damaging impact or fact of damage. It argues that the effect of the alleged activities of the pools going back to 1926, the date of the inception of the Canadian pool (Z.Rep.Br. 42) was "continuing" and "cumulative" and that *those effects* "carried forward" into the damage period (see, e.g., Z.Rep.Br. 28, 41-42). This is merely another way of asserting Zenith's old contention that it is entitled to recover damages for its inability to build up markets allegedly resulting from activities of the pools taking place *prior to* the damage period, even as far back as 1926 (H.R.Br. 147-48).

This argument is based on a misconstruction of this Court's opinion in *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Zenith refers to footnote 15 at 392 U.S. 502 where this Court stated that the practice of United Shoe in refusing to sell shoe machinery "constituted

a continuing violation of the Sherman Act" which inflicted "continuing and accumulating harm" (Z.Rec.Br. 39-40). But this Court did not hold that recovery could be had for activities occurring prior to the relevant damage period. Instead, the point being considered in the footnote was whether an *initial* impact on Hanover in the year 1912, not sued on within the statutory period after that date, barred recovery on the instant claim which was based on a continuation of United's lease-only practice and resulting impact on Hanover in later years. This Court held that failure to sue within the limitations period after 1912 did not bar the recovery sought by Hanover (392 U.S. at 502), but the only recovery sought and permitted was limited to damages flowing from rental payments which Hanover was forced to pay United during the damage period, *i.e.*, from 1939 (the beginning of the applicable statutory period) until 1955 (392 U.S. at 483-84, 494-495):

> "Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble damage suit when it proved that United had overcharged it *during the damage period* and showed the amount of the overcharge . . ." (392 U.S. at 494).

In footnote 15 referred to by Zenith, this Court was making reference to a continuing violation "of the Sherman Act" *within* the period of limitations "which inflicted continuing and accumulating harm" *during* that period (392 U.S. at 502, n. 15). It did not say that Hanover could collect damages for injury caused by acts which took place from 1912 to 1939, prior to the relevant damage period, which is what Zenith claims a right to do here.

Zenith's argument also ignores the record in the instant case:

(a) *Embargoes.* In the case of England and Australia, since the governmental embargoes "and nothing else" kept Zenith from importing to those countries from World War II until June 1959 as to England, and April 1960 as to Australia (A. 3203-05), the English and Australian pools *had no effect* on Zenith's business, "continuing," "cumulative" or otherwise, for twenty years prior to the four-year period. There is nothing in the record to show that the acts of the pools taking place prior to the inception of the embargoes at the outbreak of World War II in 1939 hurt Zenith during 1959-1963. In fact, Zenith's witnesses admitted that these pre-World War II acts did not have any effect after 1959 because they acknowledged that in both England and Australia they would have had to "start from scratch" after the lifting of the embargoes (A. 3437-38, 3490; H.R.Br. 18-22).

(b) *Crotty Affidavit.* As to all three countries, Zenith's 1963 motion for leave to file its counterclaim represented, and Crotty in his affidavit in support *swore,* that the *acts causing damage* had occurred *since* the filing of the answer (April 7, 1960). (A. 63; H.R.Br. 7). This is totally inconsistent with any contention that prior acts had caused damage to Zenith during the relevant period. Zenith's attempt to escape the limitations of its motion and affidavit (Z.Rep. Br. 12) fails on its face. For the paragraph of the motion cited by Zenith, after alleging that the counterclaim rose out of the "matters set forth" in paragraphs 12 and 13 of the answer, "and current related unlawful *activities* of plaintiff occurring *since the filing of the answer,*" stated "which *activities* are the proximate cause of present and continuing damage to defendant sustained after the filing of the answer" (A. 62). Irrespective of the wording of the motion, the clear and unambiguous language of the Crotty

affidavit limits the motion by stating that the matters "which are the proximate cause of damages alleged and require the relief sought in said counterclaim, occurred after the filing of the answer herein" (A. 63).

(c) *Releases.* The releases given by Zenith in settlement of the *RCA* case in September 1957 expressly released damages which might result in the future caused by acts prior to September 1957 (A.2957-60; H.R.Br. 47-49). Thus, Zenith released whatever damage, cumulative or otherwise, it might have incurred in 1959-1963 as a result of acts which took place before September 1957. Yet, it is precisely such damages that Zenith claims a right to recover. Contrary to Zenith's assertion (Z.Rep.Br. 40), there is nothing in this Court's decision in *Hanover Shoe* which in any way weakens the defense of the release or the statute of limitations because the only damages awarded to Hanover were those suffered *in* the damage period as a result of the illegal acts *during* the damage period (392 U.S. at 483-84, 494-95).

Furthermore, in *Hanover,* the impact in the damage period was clear because plaintiff desired to buy the machines, could not engage in its business without the machines and was therefore forced to pay rentals (392 U.S. at 487). Here, there was no impact as to Canada because Zenith took the position that it was already fully licensed, and thus would not have taken a license if offered. Zenith went into Canada and sold in large quantities without a pool license and without interference by the pool (H.R.Br. 51-53). There is no showing that it incurred any additional cost or expense as a result of its not having a pool license, and there was no showing that any dealer or distributor either refused to handle its products, or cut down on the purchases of its products at any time during the damage

period as a result of Zenith's not having a pool license. There was no impact in the other countries because, as we have pointed out, the record shows, among other things, that in Australia a license was available to Zenith, and in England the contemporaneous documents in evidence show that Zenith was not kept out of the television market by the pool but that it stayed out of that market because it was waiting for a change in the system which did not take place during the damage period (H.R.Br. 40-46, 64-66).

5. At pages 4 and 11 Zenith purports to explain why it did not file a counterclaim in 1960 despite the fact that it asserted in the original findings adopted by the trial court that it had been suffering damage for many years prior thereto (H.R.Br. 8-11). Its newly devised explanation is that it was waiting for "four years of damages" to accrue as to England and Australia, because the governmental embargoes in those countries prevented any damage from accruing prior to June 1959 and April 1960, respectively.

But as we have pointed out (H.R.Br. 21-22; p. 4 *supra*), Zenith denied that embargoes had prevented imports from the United States to England and to Australia, and Zenith shifted its position only after the trial court held in October 1965 that these embargoes "and nothing else" had kept Zenith out of those countries (H.R.Br. 16-17, 19-21).

The speciousness of Zenith's new explanation is further emphasized by the fact that:

(a) It could have no application to a failure to file a counterclaim as to Canada in 1960 if Zenith in fact was being hurt, for no governmental embargo had existed in Canada.

(b) Zenith's 1963 motion and the Crotty affidavit, purporting to explain why no counterclaim had been previously

filed, made no mention of the embargoes or "waiting for four years of damage" to accrue (A. 62-63).

(c) In May 1963, when the counterclaim was filed, the Australian embargo had been lifted for only three years (H.R.Br. 16-17), not for "four years."

(d) In effect, Zenith argues that a counterclaim is not compulsory until the entire statutory period of limitations has accrued and that one need not file a compulsory counterclaim until all of the damages which could be permitted to accrue under the statute have accrued. Rule 13 of the Federal Rules of Civil Procedure does not permit such delay. Even if only one month or one year of damages had accrued, the counterclaim would have been compulsory and should have been filed, had such a claim existed.

6. In purported support of its contention that the Australian pool prevented the importation of radio and television sets, Zenith asserts that "during the damage period only 53 American-made sets were imported into Australia" (Z.Rep.Br. 32).[4] But Zenith's contention was that the pool policy prevented the importation of radio and television sets into Australia from *all* countries, not just from the United States (see Finding XXXIV, A. 2907), and an examination of the Australian statistics (A. 3396-3406) shows that during the period radio and television sets were imported from a number of countries in substantial quantities, including imports from the United Kingdom, Japan, Germany, The Netherlands, Hong Kong, and other coun-

4. The statement is misleading because the Australian government import statistics covering the years in question (1959-60 to 1962-63, A. 3396-3406) show that in this period, in addition to 53 television sets, there were some hundreds of radios imported into Australia from the United States.

tries. The fact that there were not substantial imports from the United States was a result of the high import duty, high transportation cost and high prices of American-made sets (see H.R.Br. 139-40).

7. At pages 9-10 Zenith suggests that both "Paragraphs 12 and 13 of the Petitioner's answer" were held by the trial court to have been proved as part of the "defense of misuse asserted by" Zenith (Z.Rep.Br. 9-10). In fact, *paragraph 13* of the answer relating to foreign patent pools was *stricken* as a defense to the domestic patent suit on September 10, 1963 (Docket entry 9/10/63, A. 2; the order appears at Court of Appeals' Record page 55). Zenith's incorrect statement is obviously an attempt to create the impression that the trial judge found a connection between the domestic patent activities of Hazeltine Research and the foreign patent pools whereas the trial judge and the Court of Appeals both concluded otherwise (see H.R.Br. 124-27).

8. Zenith asserts that the "Hazeltine Companies . . . are receiving over one million dollars a year from these illegal pools" (Z.Rep.Br. 35; see also Z.Rep.Br. 2). None of the record references cited at either page in Zenith's reply brief supports these statements. In fact, the income received from the three patent pools involved in this case is not shown by the record, but counsel for Hazeltine Research can state to the Court that during the 1959-63 period, the total average annual receipts by Hazeltine Corporation from all three of these pools, directly or indirectly, were under $150,000 per year and have been substantially less since 1963. In fact, nothing has been received from the

English pool since 1963 or from the Canadian pool since 1965.

Respectfully submitted,

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